

**Bay Area Air Quality Management District's Comments on
EPA's Draft Title VI Guidance for EPA Recipients Administering Environmental
Permitting Programs (Draft Recipient Guidance) and Draft Revised Guidance for
Investigating Title VI Administrative Complaints Challenging Permits (Draft
Revised Investigative Guidance), 65 FR 39650 et seq. (June 27, 2000)**

I. Preface & Context

The Bay Area AQMD's broad geographical jurisdiction stretches from the vineyards of the Sonoma and Napa Valleys to the north, the Silicon Valley in the south, the Pacific Coastline to the west, and the Livermore Valley adjacent to the San Joaquin Valley to the east. This Bay Area air basin is home to over 8,000 facilities with air quality permits. These facilities operate over 25,000 permitted stationary sources.

The Bay Area AQMD has implemented a new and modified stationary source permitting program, pursuant to state and federal law, since 1976. The Bay Area AQMD was the first local air pollution control district in California to adopt and implement a toxic air contaminant risk management policy in 1987. This policy accomplishes four main tasks: (1) it establishes a pre-construction review process focussing on toxic air contaminants; (2) it establishes an annual toxic air contaminant emission inventory; (3) it proscribes a toxic air contaminant monitoring system; and (4) it set a District-wide goal of reducing toxic air contaminants by fifty percent (50%) by 1995 [which has been achieved]. Pursuant to state law, the Bay Area AQMD also administers an Air Toxics "Hot Spots" Information and Assessment program. Cal. Health & Saf. Code § 44300 *et seq.*

The San Francisco Bay Area has the fifth largest metropolitan population in the United States. There are approximately 5 million motor vehicles in this jurisdiction as well. It is currently designated as an ozone non-attainment area. It is also the very size, history and extent of the Bay Area AQMD's permitting program that forms the basis for the District's comments, concerns and requests for changes to EPA's Draft Recipient Guidance and Draft Revised Investigation Guidance.

In response to the 1998 Interim Guidance, the Bay Area AQMD commented on the lack of procedural certainty in filing complaints, the need for greater clarity regarding Title VI complaints and permit modifications and annual renewals, the need for specificity on how a disparate impact and a significant disparate impact were to be determined, and what would constitute sufficient justification for taking a particular permit action in the face of a Title VI administrative complaint. Although much of these concerns have been addressed in the Title VI guidance documents dated June 27, 2000, some concerns remain and are articulated below.

II. Specific Comments About the Draft Recipient Guidance

On the whole, the Bay Area AQMD applauds and supports EPA's efforts to provide guidance to environmental regulatory agencies through its Draft Recipient Guidance. This guidance responds directly to questions involving the design and implementation of local programs to prevent or preclude Title VI challenges. There are, however, some concerns about the Draft Recipient Guidance as follows.

Although it is clear that there can be allegations of discrimination in the public participation process of a permit action (65 FR 39672) – EPA has chosen not to include public participation guidance in its Draft Revised Investigation Guidance. Instead, recipients are at their own risk regarding how it conducts its public outreach and education efforts. It is not fair of EPA to allow for Title VI complaints regarding public participation in the absence of public participation investigation guidance. The Bay Area AQMD strongly urges EPA to exercise its discretion in this area (65 FR 39669) and issue such guidance forthwith.

Most troubling to the Bay Area AQMD in the area of “Due Weight and Proactive Title VI Approaches” is the statement, “EPA cannot completely defer to a recipient's own assessment that it has not violated Title VI or EPA's regulations and cannot rely entirely on an assertion that a Title VI approach has been followed.” The Bay Area AQMD is already on the path toward developing “Area-Specific Approaches” that involve the convening of groups of stakeholders to identify problems and corresponding solutions. The Bay Area AQMD's Environmental Justice Working Group is a prime example of this effort. However, such expenditure of time and resources apparently may not have any benefit to the agency, the permit applicant and to the breathing public if the EPA may simply ignore such efforts when determining if Title VI has been violated or not.

A review of the three suggested approaches for implementing a Title VI compliant permitting program reveals the following findings. First, a Comprehensive Approach, if done according to the Draft Recipient Guidance and Draft Revised Investigation Guidance would be prohibitively burdensome on limited Bay Area AQMD resources and impractical given the other state and federal mandates placed on its programs. Second, the Area-Specific Approach would probably require extensive air quality and meteorological monitoring to ensure compliance. The cost of this type of program would also be very taxing on limited Bay Area AQMD resources. The Case-by-Case Approach offers the most flexibility to a recipient like the Bay Area AQMD that can dovetail some of the suggested Title VI activities to its existing permitting program.

As early stated in the Bay Area AQMD cover letter to these comments, EPA's response to land use issues and Title VI administrative complaints involving environmental permitting programs is inadequate. EPA attempts to dismiss land use and zoning concerns by responding that, “The recipient's operation of its permitting program is independent of the local government zoning activities.” This statement completely ignores the reality of land use decision-making and planning. EPA needs to acknowledge that there is a strong likelihood that “significant disparate adverse impacts” may exist due

to historical and present day zoning patterns and practices that very well may cause significant differences in socioeconomic and housing patterns among minorities and non-minorities in relation to permitted stationary sources of pollution. EPA's failure to recognize and address this issue is a substantial flaw of this Draft Recipient Guidance and is a detriment to the success of this laudable EPA effort. The Bay Area AQMD strongly urges the EPA to be the catalyst for bringing city and county government agencies to the table with recipient agencies to help create effective and complete solutions to these Title VI issues and problems.

EPA's discussion of meaningful public participation ought to include its own reasoning, and conclusion regarding allegations of discrimination in public participation set forth in EPA's OCR Investigative Report for Title VI Administrative Complaint File No. 5R-98-R5 (Select Steel Complaint). Specifically, where the recipient provided notice of public hearings above and beyond regulatory requirements and where the recipient's use of a mailing list of interested parties was consistent with regulatory requirements, EPA's OCR did not find a violation of Title VI or its implementing regulation in the area of public participation.

III. Specific Comments About the Draft Revised Investigation Guidance

A. Bay Area AQMD Support for Portions of Draft Revised Investigation Guidance

The Bay Area AQMD supports a number of EPA positions set forth in the Draft Revised Investigation Guidance. We have summarized those positions below and provided additional comment where necessary to make these positions even more useful for recipient agencies/permitting authorities.

- (1) The filing or acceptance for investigation of a Title VI complaint will not suspend or reverse an issued permit, since the investigation process is focused on the actions of the recipients, not of the permit applicants. (65 FR 39676) This position gives this entire Title VI implementing regulation process a level of certainty and the EPA should remain steadfast on this point.
- (2) If an impact is not significantly adverse, the allegation is not expected to form the basis of a finding of non-compliance with EPA's Title VI regulations. (65 FR 39680) The reality of environmental permitting programs is that almost every permit allows some pollution to exist. It could thus be argued that every permit has some impact. By emphasizing the significance of an impact, there is less of a likelihood that every permit will be challenged and less of a likelihood of an avalanche of Title VI administrative complaints in EPA's OCR.

This EPA position is consistent with its decision in the Select Steel Complaint cited above where the EPA's OCR stated that, "The environmental laws that EPA and the states administer generally do not prohibit pollution outright;

rather, they treat some level of pollution as “acceptable” when pollution sources are regulated under individual, facility-specific permits, recognizing society’s demand for such things as power plants, waste treatment systems, and manufacturing facilities . . . society recognizes that we need facilities to treat and dispose of wastes from our homes and businesses . . . despite the fact that these operations also result in some pollution releases. The expectation and belief of the regulators is that, assuming that facilities comply with their permit limits and terms, the allowed pollution levels are acceptable and low enough to be protective of most Americans.” There is also the following statement in an EPA OCR letter dated October 30, 1998 to Father Phil Schmitter, St. Francis Prayer Center and Russell Harding, Michigan Department of Environmental Quality Re: EPA File No. 5R-98-R5 (Select Steel Complaint) that promulgates the position that, “If there is no adverse effect from the permitted activity, there can be no finding of a discriminatory effect which would violate Title VI and EPA’s implementing regulations.” It is just these kinds of statements of how environmental regulations fit within our entire governmental and civil rights structure that needs more exposure and articulation throughout the Draft Recipient and Draft Revised Investigation Guidance documents.

- (3) The determination of an adverse impact would “first evaluate the risk or measure of impact **compared to benchmarks for significance provided under any relevant environmental statute, EPA regulation or EPA policy.**” (65 FR 39680; emphasis added) EPA should expressly state in its Draft Revised Investigation Guidance that local air pollution control regulations and levels of significance are relevant for this benchmarking purpose. Again, this is consistent with the EPA’s OCR Investigative Report in the Select Steel Complaint.
- (4) “Denial or revocation of a permit is not necessarily an appropriate solution, because it is unlikely that a particular permit is solely responsible for the adverse disparate impacts.” (65 FR 39683) This EPA position should prompt it to develop objective criteria for developing programs that avoid or remedy any disparate impact. The Bay Area AQMD’s criteria and toxic air pollutant permitting programs are examples of programs that assure that individual permits do not cause a significant adverse impact.
- (5) Under the discussion of “due weight” to a permitting agency’s analysis and submitted information (65 FR 39674 et seq.), EPA explains that it will evaluate a Title VI complaint in light of information provided by the permitting authority, such as the Bay Area AQMD, and the nature of the programs the permitting authority has in place to reduce or eliminate any disparate adverse impact. As explained in the cover letter to these comments, the Bay Area AQMD has a criteria and toxic air contaminant pre-construction permit review program, and when coupled with appropriate CEQA

environmental impact review for a permit project, there is an effective program to reduce or eliminate any disparate adverse impact from a particular permit decision. EPA also states that where it finds a permitting agency has entered into an “area-specific agreement” with community representatives and stakeholders that will adequately reduce adverse impacts over a reasonable period of time, it will likely dismiss any Title VI administrative complaints on a permit(s) covered by the “area-specific agreement.”

The Bay Area AQMD requests that EPA take this same approach to dismissing a Title VI administrative complaint where the permitting authority has in place and in operation programs that adequately reduce adverse impacts over a reasonable period of time in the absence of any “area-specific agreement.” EPA ought to show preference and accord deference for programs that accomplish this goal of reducing adverse impacts over a reasonable period of time. To this end, EPA ought to promulgate objective and practical guidance on what such a program should look like.

Such recognition by EPA would be consistent with EPA’s OCR conclusion in the Select Steel case. Specifically, “EPA believes that where, as here, an air quality concern is raised regarding a pollutant regarding pursuant to an ambient, health-based standard, and where the area in question is in compliance with, and will continue after the operation of the challenged facility to comply with, that standard, the air quality in the surrounding community is presumptively protective and emissions of that pollutant should not be viewed as “adverse” within the meaning of Title VI.” The Bay Area AQMD supports such reasoning and encourages EPA to include such statements in its Draft Revised Investigation Guidance.

- (6) EPA’s recognition of cost and technical feasibility in evaluating mitigation and less-discriminatory alternatives (65 FR 39683) is a positive move. This gives the justification portion of the Draft Revised Investigation Guidance a good dose of economic reality.

B. Bay Area AQMD Concern about New and Modified Permits and Permit Renewals in relation to the Draft Revised Investigative Guidance

The Draft Revised Investigation Guidance states that, “Permit actions, including new permits, renewals, and modifications, that allow existing levels of stressors, predicted risks, or measures of impact to continue unchanged” could form the basis for initiating a Title VI investigation of the recipient’s permitting program. (65 FR 39677) The Bay Area AQMD respectfully requests that EPA reconsider its position on this aspect of the Draft Revised Investigation Guidance. Pursuant to the California’s statutory scheme for air permits set forth in California Health & Safety Code Section 42300 *et seq.*, a permitting authority may annually extend a permit and not have such an action constitute a “permit issuance, renewal, reopening, amendment or any other action subject to the requirements” of Title V. Health & Safety Code Section 42300, subdivision (c). Health

& Safety Code Section 42301(e) does require that each permit upon annual renewal be reviewed to determine that the permit conditions are adequate to ensure compliance with and enforceability of local air pollution control district rules and regulations. Under this law, the Bay Area AQMD will impose permit conditions that may correct a problem that has surfaced since the last permit renewal. Given state law, permit renewals ought to be seen and treated differently than new or modified permits. Renewals involve existing facilities and do not lend themselves to a reasonable project alternative and mitigation analysis. EPA has the ability to monitor permit renewals for compliance with Title VI through its authority under 40 CFR § 7.85(b). There is no need to make permit renewals areas for a Title VI challenge.

Moreover, EPA should unequivocally state that administrative changes, such as a name change or change in mailing address of a permitted facility shall not be the basis of a finding of Title VI noncompliance instead of stating that such changes “generally” will not form the basis of a finding of noncompliance. (65 FR 39677) Although there may be extremely rare cases where even a modification that results in a “beneficial” impact (when viewed in isolation) may be part of a pattern of disparate impact when a minority community receives a smaller benefit than a non-minority community -- EPA should make clear that environmentally beneficial permit actions will not be the basis for a finding of noncompliance – except in those very rare circumstances. In other words, the context of a particular permitting action is crucial.

C. Bay Area AQMD Problems with the Determination of a Significant Adverse Impact from a Project or Facility’s Air Emissions

- (1) The Draft Revised Investigation Guidance does not specify the level of health risk that is considered a significant adverse impact.

This is a fundamental policy issue that should be stated explicitly. The draft guidance provides only a “bright line” for what EPA considers *de minimis* health risk. For cancer risk, EPA indicates that cumulative risks in the range of 1 in a million to 100 in a million may result in an adversity finding, with such a finding being “more likely” where risks are above the upper end of that range. For non-cancer risk, EPA indicates that an adversity finding may be made if the cumulative non-cancer risk is above 1; with the likelihood of such a finding increasing the farther the risk is above that level. Thus, EPA has not defined what a significant adverse impact is; rather, they have indicated what they believe it is not: *i.e.*, a cumulative cancer risk less than 1 in a million and a cumulative non-cancer hazard index less than 1. This is of no help whatsoever because all cumulative risks (including background exposures) will exceed these *de minimis* levels.

- (2) The Draft Revised Investigation Guidance confuses incremental impacts with total cumulative impacts when considering how a significant adverse impact should be determined.

The Draft Revised Investigation Guidance indicates that the potential cumulative adverse risk levels given above are within the range of risk values that EPA uses for implementing various environmental programs. The focus of these environmental programs is typically, however, quite narrow (*e.g.*, the risk from drinking water contaminated with a particular pollutant, the risk from exposure to air pollutants emitted from a particular source). Under a Title VI adverse impact determination, the Draft Revised Investigation Guidance indicates that a finding of adverse impact should be based on cumulative impacts, as defined in a very broad manner. For example, risks should be based on cumulative exposure to multiple environmental stressors including exposures originating from multiple sources, and traveling via multiple pathways over a period of time. Stressors may be chemical air pollutants, but also may also be physical (*e.g.*, noise, temperature) and biological (*e.g.*, pathogens, parasites). It is inappropriate to use the same risk levels that have been used to judge the significance of incremental health risks in judging the significance of all environmental risks in total.

- (3) The Draft Revised Investigation Guidance does not establish incremental *de minimis* risk levels that can be used to screen out projects or facilities that do not significantly contribute to health risks.

Cumulative impact analysis, as defined by EPA in the draft guidance, simply cannot be completed for the large number of permits issued. Modeling tools necessary to rapidly evaluate cumulative impacts are not available and, even if they were, they could not be used because of a lack of detailed model input data. Due to these significant technical and resource limitations, any workable Title VI program must incorporate the concept of *de minimis* incremental health risk. In this way, a project or facility with *de minimis* incremental health risks can be eliminated from further Title VI consideration without more detailed cumulative impact analyses. A good example of this concept is given in EPA's PSD regulations where a proposed project is deemed acceptable regardless of background pollutant exposure levels if the incremental pollutant concentration is below *de minimis* levels.

D. Bay Area AQMD Concerns about Timing of Title VI Administrative Complaint Investigation

- (1) Ongoing Permit Appeals or Litigation

“OCR will generally dismiss complaints without prejudice if the issues raised in the complaint are the subject of either ongoing administrative permit appeals [*i.e.*, a permit appeal brought before the Bay Area AQMD Hearing Board

pursuant to Health & Safety Code §§ 42306-42309 or a PSD permit appeal before the EPA's Environmental Appeals Board pursuant to 40 CFR Part 124] or litigation in Federal or state court . . . In such cases, OCR believes that it should await the results of the permit appeal or litigation.” (65 FR 39673) The Bay Area AQMD requests that the EPA re-think its position on this matter because a Title VI complaint that follows a lengthy appeal or litigation process only creates an untenable level of uncertainty to the recipient and to the permit applicant/holder. EPA ought to receive such complaints and use it as an opportunity to craft solutions with the recipient agency for Title VI issues raised in the complaint. Waiting until after an appeal or litigation is complete sends the wrong message and allows the recipient and the permit applicant to move forward in the process thinking that there are no Title VI issues.

(2) Need for an Established Timeframe for Title VI Administrative Complaint Resolution

Although EPA's Draft Revised Investigation Guidance at Appendix B: Title VI Complaint Process Flow Chart does include some time lines or time frames for particular parts of the investigative process -- there is no overall time frame for resolving these complaints. Currently, EPA's OCR has approximately 50 such complaints in its docket awaiting investigative analysis. Although the Bay Area AQMD is aware of Congressional limitations on handling these complaints -- EPA must provide a certain, discernable process as far as timing goes in order to avoid a long and counter-productive process.

E. Bay Area AQMD Concern for the Prompt Dismissal of Meritless Title VI Administrative Complaints

EPA states that its policy is to “investigate all administrative complaints concerning the conduct of recipient of EPA financial assistance that satisfy the jurisdictional criteria in EPA's implementing regulations.” (65 FR 39672) Unlike procedures for the appeal of a PSD permit before the EPA's EAB pursuant to 40 CFR Part 124, a Title VI administrative complainant does not carry any burden of producing evidence to trigger an EPA OCR investigation. Approximately 50 Title VI administrative complaints are currently on file because they all meet minimum jurisdictional requirements. Some of these complaints are over 5 years old. The uncertainty to all parties is unacceptable. EPA must develop and use a procedure to dismiss or dispose of Title VI administrative complaints that have no factual or legal merit. Such a program can and should be consistent with Title VI complaints in federal court. Even if this approach is unacceptable to EPA, EPA should give the recipient a summary judgment, demurrer or motion to dismiss procedure/mechanism whereby the burden is placed on the recipient to make specified showings that justify early dismissal of the complaint.